

IN THE QUEEN'S BENCH.

APPEAL SIDE

THOMAS C. AYLWIN,

APPELLANT.

(Plaintiff in Queen's Bench.)

AND

HENRY JUDAH,

RESPONDENT.

(Defendant in Queen's Bench.)

RESPONDENT'S CASE

IN THE QUEEN'S BENCH.

APPAL SIDE

THOMAS C. AYLWIN.

PROVINCE OF CANADA,
DISTRICT OF MONTREAL.

IN THE QUEEN'S BENCH.

APPEAL SIDE.

THOMAS C. AYLWIN,

APPELLANT,

(Plaintiff in Court below.)

AND

HENRY JUDAH,

RESPONDENT,

(Defendant in Court below.)

RESPONDENT'S CASE.

The Appellant instituted before the Superior Court in the District of Montreal an hypothecary action against the Respondent as the "*Détenteur*" of a certain immovable property called the "*Bocage*," situated in the City of Montreal, founded on a mortgage made and consented by the Honorable Jean Roch Rolland, in favor of the Honorable Samuel Gale, dated 23rd November, 1840, and subsequently transferred to the Appellant.

The Respondent having by Deed of Sale, dated 6th November, 1852, purchased the property in question from the said Honorable Jean Roch Rolland, free of all incumbrances whatsoever, with the further stipulation in the said Deed of Sale as follow: "*Déclarant de plus la propriété présentement vendue franche et quitte de toutes autres charges et hypothèques.*" And having paid at the time of the passing of the said Deed of Sale the whole amount of the purchase money brought an action "*en garantie formelle*" against the said Honorable Jean Roch Rolland, who filed no plea either to the principal action or action "*en garantie*," both demands being inscribed for hearing on the merits *ex parte*. The Superior Court on the 28th day of February last past rendered the following Judgment:—

The 28th February, 1857.

PRESENT:—The Honorable Mr. Justice Smith,
" Mr. Justice Mondelet,
" Mr. Justice Chabot.

The Court having heard the principal Plaintiff by his Counsel, upon the principal demand *ex parte*, the principal Defendant not having pleaded to the principal Demand, and being duly foreclosed from so doing, and having also heard the Plaintiff *en garantie* by his Counsel upon the *demande en garantie*, and having been duly foreclosed from so doing, having examined the proceedings, proof and evidence of Record, and deliberated adjudging. *Firstly*, upon the principal demand and considering that the said Plaintiff, Thomas Cushing Aylwin, hath failed to establish that the debt now claimed by him under transfer from William Aylwin, to him the said Plaintiff, and bearing date the 28th November, 1840, is due by and exigible from the Honorable Jean Roch Rolland, the principal debtor, as set forth in his declaration; and considering further, that by act before Maître Guy and his colleague Notaries Public, and bearing date the 19th day of August, 1852, the said William Aylwin, acting therein through his attorney the present principal Plaintiff, did agree to and with the said Honorable Jean Roch Rolland to give delay of payment to the said Honorable Jean Roch Rolland for a period of ten years, to be computed from and after the said 19th day of August, 1852, of the debt then vested in him the said William Aylwin, by transfer bearing date the said 19th day of August, 1852, from

John Rowand, Esquire, acting through his attorney, Duncan Finlayson, Esquire, before Maitre Guy and his colleague Notaries Public, and that by reason of such delay of payment the said Plaintiff cannot, *quant a present*, now have and maintain his said action *hypothecaire* as now brought, doth dismiss the said action *hypothecaire quant a present* with costs.

And the Court further: considering that by reason of the said action *hypothecaire* having been so instituted by the said Plaintiff the said Defendant was entitled by law to implead the said Defendant *en garantie*, the Honorable Jean Roch Rolland, as his *garant formelle* as in and by the said action *en garantie* he hath done, and considering that the said principal Plaintiff hath failed to establish by law any right to the conclusions by him taken, as this Court cannot now adjudicate upon the said action *en garantie* the Court doth condemn the said Plaintiff, *Demandeur principal*, to pay the costs thereof.

It is from this Judgment that the present Appeal is brought.

THOMAS S. JUDAH,
Attorney for Respondent.

Montreal, September 23, 1857.

